Supreme Court, U.S.
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Docket Number:

United States Supreme Court

During the Term Beginning On October 6, 1997,
And Ending On October 4, 1998

JAMES T. KIMBALL,

Petitioner,

vs.

ERNIE CLAUSNTIZER, JOSE CORDERO, ROBERT P. DANITI, DENNIS DEGAN, PHILIP L. B. HALPERN, M. GREGORY JONES, ERNIE LOPEZ, ARTHUR J. MAHONEY, DEBORAH ORR, STEPHEN PEREZ, and ROBERT SIBERSKI,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES T. KIMBALL, Petitioner, pro se.
29949 S.R. 54 West
Wesley Chapel, Florida 33543
(813) 973-7200
(813) 973-7002-fax

95 pp

Questions Presented For Review

1. Whether agents of a state administrative agency, empowered with the statutory authority to conduct warrantless searches and seizures of highly regulated businesses, can conduct a warrantless search and seizure at a business in any other manner except as prescribed by the state statute.

2. Whether agents of a state administrative agency can enter a business at the request of federal agents executing federal search warrants, and then once having gained entrance under the authority of the federal search warrant, switch hats, and conduct a warrantless search and seizure under statutory authority, without observing the constitutional safeguards written into the state statute.

3. Whether agents of a state administrative agency, empowered with the statutory authority to conduct warrantless inspections of a highly regulated class of businesses, can conduct a warrantless search and seizure at a private residence, when their statutory authority to conduct inspections contains no provisions to conduct an inspection at a residence.

4. Whether agents of a state administrative agency have the discretionary authority to disregard the provisions of a state statute which specifically limits their discretion and describes the manner in which warrantless inspections are to be conducted, and thus be immune from a suit for damages brought under 42 U.S.C. §§ 1983 and 1985.

5. Whether federal agents executing a federal

search warrant can assist state agents who are conducting a state warrantless search and seizure at the same time that the federal search warrants are being executed.

6. Whether federal agents executing federal search warrants have a duty to insure that state agents assisting in the execution of the federal search warrants remain within the confines of the federal search warrants.

7. Whether a cause of action exists against federal agents for constitutional rights deprivations when they assist state agents conducting a state warrantless search and seizure, if lawful entrance to the premises is obtained pursuant to a valid federal search warrant.

8. Whether a cause of action exists against governmental attorneys who were not present, but who were aware, and failed to stop, state warrantless searches and seizures by state administrative agents with the assistance of federal agents, all of whom gained entry to the premises pursuant to a federal search warrant.

9. Whether all items seized during the execution of federal search warrants must be seized by federal agents under the authority of the federal search warrants and must be listed on the returns to the federal magistrate issuing the warrants.

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456 F.Supp. 973 (M.D.Fla. 1978)

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572 F.2d 1137 (5th Cir., 1978)

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493 F.2d 682 (2nd Cir.), cert. denied sub non., Terraciano v. Smith, 419 U.S. 875 (1974)

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1 Fla Jur 2d, Administrative Law § 20

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FLA AGO 90-28, 1990 WL 509050

Parties

All parties are identified on the cover of this Petition. Pursuant to the provisions found in Rule 12.6, Petitioner James T. Kimball hereby notices the Court that Arthur J. Mahoney has no interest in this Petition. An agreement has been reached between James T. Kimball and Arthur J. Mahoney which releases Arthur J. Mahoney from any further litigation based on the allegations in the Complaint.

Statement of Jurisdiction

The United States Supreme Court has jurisdiction to review on a writ of certiorari the following orders pursuant to 28 U.S.C. § 1254:

In Civil Case Number 95-01399-CIV-T-24E, United States District Court for the Middle District of Florida,

Tampa Division:

1. The order issued on March 22, 1996;
2. The order issued on April 17, 1996; and
3. The order issued on August 7, 1996.

In Civil Case Number 96-3282, United States Court of Appeals for the Eleventh Circuit:

1. The order issued on September 12, 1997 affirming the District Court's orders listed above; and
2. The order on November 24, 1997 denying a motion for rehearing.

Constitutional Provisions
(Text in Appendix)

Fourth Amendment
Fifth Amendment
Fourteenth Amendment

Federal Statutes

28 U.S.C. § 1254
28 U.S.C. § 1331
28 U.S.C. § 1343
28 U.S.C. § 2201
28 U.S.C. § 2202
42 U.S.C. § 1983

42 U.S.C. § 1985

Florida Statutes

499.003(12)
499.051
933.21

Statement of the Case

1. On May 12, 1993, federal agents executed federal search warrants at the residence of Petitioner, JAMES T. KIMBALL (hereinafter "KIMBALL"), and at the premises housing DISCOVERY EXPERIMENTAL AND DEVELOPMENT, INC. (hereinafter "DEDI"), a Florida corporation. KIMBALL is the president of DEDI.

2. At DEDI's premises, all employees were removed within thirty minutes of the entrance by federal agents executing the warrant. At KIMBALL's residence, KIMBALL was allowed to unlock the door, secure his dog, and was then ordered to leave. No family member was allowed to remain.

3. Accompanying the federal agents executing the federal search warrants at both locations were agents of the Florida Department of Health and Rehabilitative Services (hereinafter "HRS"), namely DEBORAH ORR (hereinafter "ORR") and M. GREGORY JONES (hereinafter "JONES"). ORR and JONES were part of the federal task force, and were asked to participate in the execution of the federal

search warrants by the United States Customs Service. KIMBALL was not aware of the entrance of JONES or ORR into either one of the premises, or of their participation as part of the federal task force teams executing the federal search warrants.

4. At some point during the execution of both federal search warrants, JONES and ORR made the decision to switch hats, and conducted inspections under Florida Statute 499, which resulted in the seizures of certain items by HRS agents.

5. Florida Statute 499.051 permits HRS to conduct warrantless inspections of drug manufacturers, wholesalers and distributors, and any establishment in which drugs are held. Florida Statute 499.003(12) defines an establishment as a place of business.

6. The Florida Legislature has written into Florida Statute 499 constitutionally adequate safeguards to protect businesses engaged in a highly regulated industry from unconstitutional warrantless searches and seizures. These safeguards include, but are not limited to:

(a) HRS agents must identify themselves;

(b) HRS agents must announce their intention to conduct an inspection;

(c) The time, place and scope of the inspection is limited; and

(d) The decision to conduct inspections is made

by the department, and not at the discretion of the agent. None of these safeguards were observed by JONES and ORR on May 12, 1993 at KIMBALL's residence, or the premises housing DEDI.

7. Additionally, Florida Statute 499 contains no provision to conduct an inspection at a residence, and the provisions found under Florida Statute 933.21 strictly forbid administrative inspection warrants at owner-occupied residences.

8. At KIMBALL's residence, JONES and ORR were assisted in the state search and seizure by United States Customs Agent JOSE CORDERO, the federal agent to whom the federal search warrant was directed.

9. At DEDI's premises, ORR was assisted in the state search and seizure by federal agents ERNIE CLAUSNITZER, ERNIE LOPEZ, and ROBERT SIBERSKI, who were present to execute the federal search warrant.

10. HRS Attorney ROBERT P. DANITI, Assistant United States Attorney PHILIP L.B. HALPERN, and United States Food and Drug Administration Attorney DENNIS DEGAN were not present, but were aware of the state searches and seizures being conducted at KIMBALL's residence and at DEDI during the execution of the federal search warrants.

11. On or about August 23, 1995, KIMBALL filed a Complaint for damages under 42 U.S.C. § 1983 and 1985, in the United States District Court, Middle District of Florida, Tampa Division, Case Number 95-01399-CIV-T-24E and

alleged violations of constitutional rights under the Fourth, Fifth, Ninth, and Fourteenth Amendments. KIMBALL claimed that jurisdiction was appropriate pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

12. On March 22, 1996 Judge Susan C. Bucklew, United States District Court for the Middle District of Florida, dismissed ORR, JONES, and ROBERT P. DANITI and found that qualified immunity shielded them from liability. Judge Bucklew did not have a hearing before determining this issue.

13. During a hearing on April 17, 1996, Judge Bucklew dismissed the remaining defendants and found that KIMBALL had failed to state a cause of action upon which relief can be granted.

14. On August 7, 1996 Judge Bucklew issued an order denying KIMBALL's motion for leave to amend the complaint, and directed the clerk to close the case.

15. KIMBALL appealed these decisions to the United States Court of Appeals for the Eleventh Circuit, Case Number 96-3282. The Appellate Court affirmed the district court's decisions on September 12, 1997, and denied KIMBALL's motion for rehearing on November 24, 1997.

16. No criminal charges were ever filed as a result of the execution of the federal search warrants on May 12, 1993. On May 15, 1997 Magistrate Judge Elizabeth A. Jenkins, United States District Court, Middle District of Florida, ordered the return of all items in the possession of the federal authorities that were seized on May 12, 1993. To

date, Magistrate Judge Jenkins has made no findings concerning the execution of the federal search warrants, nor did Magistrate Judge Jenkins make any findings concerning the searches and seizures by HRS agents on May 12, 1993. HRS has vehemently refused to return items seized by its agents on May 12, 1993 at both premises.

Argument

The Fourth Amendment to the United States Constitution states:

> **The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.**

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> **All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due**

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless its authorized by a valid search warrant. **Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 528-529, 87 S.Ct. 1727, 1731 181 L.Ed.2d 930 (1967), citing: Stoner v. State of California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951); McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948); Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925).**

One of the exceptions to the warrant requirement includes the warrantless search of businesses involved in industries **"long subject to close supervision and inspection". Colonnade Catering Corp. v. United States, 397 U.S. 72, 77, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (retail liquor industry); see also New York v. Burger, 482 U.S. 691, 702-704, 107 S.Ct. 2636, 2644-45 96 L.Ed.2d 601 (1987) (automobile junkyards); Donovan v. Dewey, 452 U.S. 594, 602-03 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (mine health and safety standards); United States v. Biswell, 406 U.S. 311, 316-17, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (firearm regulations); United States v. Thriftimart, Inc., 429 F.2d 1006, 1008-10 (9th Cir.), cert. denied, 400 U.S. 926 (1970) (federal food standards).** The pharmaceutical industry is an industry with a long history of pervasive supervision and inspection. **United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532,**

537-38 (8th Cir. 1981) cert. denied, 455 U.S. 1016 (1982); United States v. Schiffman, 572 F.2d 1137, 1142 (5th Cir. 1978); United States ex rel. Terraciano v. Montanye, 493 F.2d 682, 684-85 (2nd Cir.), cert. denied sub non., Terraciano v. Smith, 419 U.S. 875 (1974); United States v. Montrom, 345 F.Supp. 1337, 1339-40 (E.D.Pa. 1972), aff'd, 480 F.2d 918 (1973); cf. United States v. Roux Laboratories, Inc., 456 F.Supp. 973, 976-77 (M.D.Fla. 1978).

However, a warrantless search even of a pervasively regulated business is authorized only so long as three criteria are met. First, there must be a substantial governmental interest in regulating the particular industry. New York v. Burger, 107 S.Ct. at 2643-44; Donovan v. Dewey, 452 U.S. at 602. Second, warrantless inspections must be **"necessary to further [the] regulatory scheme"**. New York v. Burger, 107 S.Ct. at 2644 (quoting Donovan v. Dewey, 452 U.S. at 600). Lastly, to pass constitutional muster, a statute authorizing warrantless inspections must safeguard the rights of the the business searched. The Supreme Court wrote in New York v. Burger, 107 S.Ct. at 2644:

> **Finally, "the statute's inspection program in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant" Ibid. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and**

it must limit the discretion of the inspecting officers. See Marshall v. Barlow's, Inc., 436 U.S., at 323, 98 S.Ct. 1830; see also id., at 332, 98 S.Ct. 1816 (Stevens, J., dissenting). To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Donovan v. Dewey, 452 U.S., at 600, 101 S.Ct. at 2539. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place, and scope." United States v. Biswell, 406 U.S., at 315, 92 S.Ct. At 1596.

The abundance of case law makes it perfectly clear that individual states may enact statutes that allow administrative agencies to conduct warrantless searches of highly regulated businesses. Florida Statute 499 is one such statute which contains provisions for warrantless searches. These provisions have been judicially determined to safeguard the rights of affected businesses. **Arthritis Medical Center, Inc. v. State of Florida, Department of Health and Rehabilitative Services, (unpublished) (S.D.Fla., 1988), aff'd, 878 F.2d 1440 (1989) (Appendix, page 66)**. However, none of the safeguards written into Florida Statute 499 were observed by HRS agents JONES and ORR on May 12, 1993. Neither agent identified themselves; neither agent announced their intention to conduct an inspection under Florida Statute 499; neither agent was

limited in the scope of their inspection but had free and unbridled access to conduct a general exploratory search; and both JONES and ORR admitted during depositions that they personally made the decision to conduct the HRS searches and seizures. Moreover, nowhere in the statute is any provision which allows a warrantless search of a residence. Such provisions could not exist in the statute since administrative search warrants themselves are not permissible at owner occupied residences pursuant to Florida Statute 933.21.

In any event, the district court dismissed HRS agents JONES and ORR and found that qualified immunity protected them from KIMBALL's suit. The district court determined that JONES and ORR were acting within their "discretionary authority" when they conducted the warrantless searches under Florida Statute 499 at KIMBALL's residence and the premises housing DEDI. The district court wrote **"If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant", citing Post v. City of Ft. Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993).**

In analyzing the actions of JONES and ORR, case law clearly stakes out that bright line. The Supreme Court has upheld the constitutionality of statutes which allow warrantless searches because the statutes limit the discretion of the officer, and insure that safeguards are in place to provide a constitutionally adequate substitute for a warrant, **New York v. Burger, 107 S.Ct. at 2644**. It stands to reason that the inspecting officers must observe those safeguards when conducting warrantless searches, otherwise the safeguards written into the laws would have no meaningful

purpose. To say that JONES and ORR have the "discretionary authority" to completely disregard the constitutional safeguards written into the statute by the Florida Legislature which limits their "discretionary authority" is clearly an erroneous finding by the district court. Most importantly, the determination that JONES and ORR were within their "discretionary authority" in conducting a warrantless search of KIMBALL's residence is also a clearly erroneous finding by the district court. There simply is no statutory provision which allows a warrantless search of a residence by JONES and ORR.

> **Administrative agencies are creatures of statutes. Their powers are special and limited, and derivative only, and they have no inherent or common-law powers. Administrative agencies have only those powers which are legally conferred upon them by the statutes of the state expressly or impliedly for the purpose of carrying out the aims for which they were established . . . and when the legislature provides that an administrative power shall be exercised in a certain way, such prescription precludes the doing of it another way. citations omitted, 1 Fla Jur 2d Administrative law § 20**

Ironically, in determining that JONES and ORR were within their discretionary authority, and that case law did not stake out a bright line which would defeat their qualified immunity defense, Judge Bucklew was not made aware of the detailed analysis of the inspection provisions of Florida

Statute 499 by a federal district court in **Arthritis Medical Center, Inc., Ibid. (Appendix, page 66)**. As a result of this detailed analysis, the Florida Attorney General wrote an official opinion concerning the constitutionality of HRS warrantless inspections conducted pursuant to Florida Statute 499. **(Fla. AGO 90-28, 1990 WL 509050) (Appendix, page 91)**.

Granted, KIMBALL should have brought this analysis and the resultant Florida Attorney General Opinion to the attention of the district court. However, unpublished opinions are not easily found, nor easily obtained by non-lawyers. In any event, the Office of the Florida Attorney General represented HRS in the suit brought by Arthritis Medical Center, Inc., and also represented JONES, ORR, and ROBERT P. DANITI in the suit brought by KIMBALL. Moreover, HRS agent JONES, a Defendant in the suit brought by KIMBALL, was also a defendant in the suit brought by Arthritis Medical Center, Inc. Clearly, there appeared to be a lack of candor with the district court and the appellate court by the Office of the Florida Attorney General which had the duty and the obligation to bring to the attention of both courts this detailed analysis by the United States District Court for the Southern District of Florida.

As another point of law to be considered, the Supreme Court should consider Defendants' contention that exigent circumstances existed on May 12, 1993 which justify the searches and seizures under State authority at KIMBALL's residence and the premises housing DEDI. The Supreme Court stated in **McDonald v. United States, 335 U.S. at 456**:

We cannot be true to [the Fourth

Amendment] and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Both premises were sealed by federal agents executing the federal search warrants, and remained sealed for over six hours. All employees were removed from DEDI's premises, and no family member was allowed admittance into KIMBALL's residence. There was no danger of anyone getting back into either of the premises and destroying evidence. The time span clearly allowed HRS agents to present affidavits to a state court and request search warrants.

Furthermore, none of the items seized by HRS agents at either location were inherently dangerous, and required immediate seizure to protect the public, and with numerous agents available to keep both premises secure, time was not of the essence, and search warrants could have been secured.

Concerning the seizures at DEDI, there was nothing to stop HRS agents from conducting an inspection pursuant to Florida Statute 499 either the day before or the day after the execution of the federal search warrant. Here again, the premises could have remained secured until the next day, and an inspection could have taken place in a manner consistent with the provisions found under Florida Statute 499.051.

The same cannot be said, however, about KIMBALL's residence, since HRS does not have the statutory authority to conduct an inspection under Florida Statute 499

Once the district court dismissed JONES and ORR, it was apparent that KIMBALL's Complaint could not stand. If KIMBALL could not make a case against JONES and ORR for the deprivation of constitutional rights as state actors, it was clear that the district court would also find that no cause of action existed against any other defendants as state actors, who assisted JONES' and ORR's execution of warrantless searches at KIMBALL's residence and the premises housing DEDI. The district court made this finding, and subsequently dismissed the case. All findings have now been affirmed by the appellate court, and KIMBALL's request for rehearing on the appellate level has been denied.

Conclusion

KIMBALL maintains that the ramifications of the district court's dismissal of his Complaint, and the subsequent decisions of the appellate court, send a dangerous signal to any and all administrative agencies within the United States that have the statutory authority to conduct warrantless searches of highly regulated businesses. The findings in this case make it clear that the agents of administrative agencies can now disregard the constitutional safeguards written into the statutes, and can have free and unbridled search and seizure power in a constitutionally protected area. And to make matters worse, these same agents can now abuse the statutes enacted to inspect highly regulated businesses to conduct warrantless searches and seizures at a residence. In essence, this case sets the precedent that the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution are inapplicable to those administrative agencies that have the statutory authority to conduct warrantless searches, and that the agents of these administrative agencies can trample on an individuals'

constitutional rights with complete immunity. KIMBALL maintains that the legislatures that enacted these administrative statutes never intended that they be used in such a manner, nor did the Supreme Court of the United States intend to condone their use in this manner in the multitude of cases finding that their provisions were constitutional.

KIMBALL believes that both the district court and the appellate court viewed KIMBALL's Complaint in a manner consistent with a multitude of other Title 42 cases brought by pro se litigants; as a frivolous complaint designed to abuse the judicial system. This is simply not the case. The Complaint was filed as a result of KIMBALL's firm belief that his constitutional rights had been violated. Because KIMBALL does not have the means to hire expensive counsel experienced in handling Title 42 cases, the constitutional rights deprivations complained of have gone unchecked. Clearly, a pro se litigant is at an extreme disadvantage when he is held to the heightened pleading standards that the courts have mandated in pleading Title 42 cases. In being held to those standards, KIMBALL believes that the courts have been prejudiced against him; a situation that the founders of our country clearly did not envision in writing the Constitution. Otherwise, the right to appear before the courts of our country as a pro se litigant would have been disallowed over two hundred years ago.

WHEREFORE, JAMES T. KIMBALL respectfully requests the Supreme Court of the United States to grant this Petition for Writ of Certiorari.

Respectfully submitted,

James T. Kimball

James T. Kimball, in propria persona
29949 State Road 54 West
Wesley Chapel, Florida 33543
Tel: (813) 973-7200
Fax: (813) 973-7002

February 18, 1998

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES T. KIMBALL,

Plaintiff,

vs. CaseNo.95-1399-CIV-T-24(E)

ERNIE CLAUSNITZER, et al.,

Defendants.
_____/

ORDER

This Cause is before the Court on the following motions:

(a) Defendants Daniti, Jones and Orr's Motion to Dismiss (Doc. No. 38, filed November 7, 1995);[1]

(b) Defendant Arthur J. Mahoney's Motion to Dismiss (Doc. No. 42, filed November 13, 1995);[2]

_____

[1]. Plaintiff filed a response on December 11, 1995 (Doc. No. 50).

[2]. Plaintiff filed a response on November 27, 1995 (Doc. No. 44). Defendant Mahoney filed a supplement to his motion on January 26, 1996 (Doc. No. 57).

(c) Defendant Arthur J. Mahoney 's Motion to Strike (Doc. No. 68, filed March 21, 1996); and

(d) Plaintiff's Motion to Amend Complaint and Add Parties (Doc. No. 67), filed March 18, 1996.

Plaintiff, proceeding pro se, commenced this action on August 23, 1995, alleging various civil rights violations under 42 U.S.C. § 1983 and 1985. On October 29, 1995 this Court granted Plaintiff leave to file an amended complaint which Plaintiff filed on October 30, 1995.

In determining whether to grant a motion to dismiss, the Court construes the Plaintiff's complaint in the light most favorable to Plaintiff, taking all allegations as true. 5 C. Wright and A. Miller Federal Practice Procedure § 1357 (1969). A motion to dismiss will be denied unless it appears beyond all reasonable doubt that the Plaintiff can prove no set of facts in support of Plaintiff's claims that would entitle him to relief. Luckey v. Harris, 860 F.2d 1012, 1016 (11th Cir. 1988), reh'g denied en banc, 896 F.2d 479 (11th Cir. 1989), and cert. denied, 1120 S.Ct. 2562 (1990). In the case of a pro se action, the Court should construe the complaint more liberally than it would from pleadings drafted by lawyers. Hughes v. Rowe, 499 U.S. 5, 9 (1980) (per curiam).

Discussion

Defendants Daniti, Jones and Orr's Motion to Dismiss

While Defendants Daniti, Jones and Orr (collectively "state defendants") present several arguments, the Court is concerned with the qualified immunity argument. Although 42 U.S.C. § 1983 provides no immunities on its face, the

Supreme Court has read it "in harmony with general principles of tort immunities and defenses rather than in derogation of them." Imbler v. Pachtman, 424 U.S. 409, 418 (1976). The initial inquiry is whether "an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts." Malley v. Briggs, 475 U.S. 335, 339-340 (1986). If an official "was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." Id. (citing Tower v. Glover, 467 U.S. 914, 920 (1984)). The Supreme Court has accorded "certain government officials either absolute or qualified immunity from suit if the 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine.'" Wyatt v. Cole, 504 U.S. 158, 164 (1992) (citations omitted). Accordingly, the defense of qualified immunity is available to all governmental officials in § 1983 actions provided certain requirements are satisfied. England v. Hendricks, 880 F.2d 281 (10th Cir. 1989), cert. denied, 493 U.S. 1078 (1990).

Plaintiff contends that since the state defendants' position were not created in 1871, the defense of qualified immunity does not apply to them. The Court rejects this argument. Since the defense was available at common law, the Court finds that it is available to these defendants, even though their position as HRS' agents was not yet created in 1871. See Malley, 475 U.S. at 340.

The existence of the defense, however, does not

necessarily mandate its application. In Zeigler v. Jackson, 716 F.2d 847 (11th Cir. 1983), the Eleventh Circuit identified the requirements to the defense.

> **In order to establish this good faith defense, a defendant must show that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. Once the defendant establishes his good faith, the burden shifts to the plaintiff to show lack of good faith.**

Id. (citations omitted). In determining whether the defendant was acting "within the scope of his discretionary authority," a defendant must demonstrate "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." Barker v. Norman, 651 F.2d 1107, 1121 (5th Cir. 1981);[3] Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994) (concluding that "discretionary authority" includes all actions of a governmental official that (1) "were undertaken pursuant to the performance of his duties," and (2) were "within the scope of his authority").

If the defendant meets this burden, the plaintiff must show that the defendant did not act in good faith. Specifically, the plaintiff must show that the defendant's actions "violated clearly established constitutional law."

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[3]. The case law of the Fifth Circuit prior to September 30, 1981 has been adopted as precedent in this judicial circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

Ziegler, 716 F.2d at 849. A law is "clearly established" when it has been "developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." Lassister v. Alabama A&M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994). "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." Post v. City of Ft. Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993).

Applying the Ziegler standard to the instant case, the Court finds that the defense of qualified immunity applies to all the state defendants. Defendants Jones and Orr entered into the premises pursuant to a lawfully obtained search warrant and Defendant Daniti initiated and pursued the enforcement action based on that investigation and evidence seized. Thus, the state defendants were acting within their "discretionary authority" and the burden shifts to the Plaintiff to show that the state defendants' conduct violated clearly established constitutional law. Having reviewed Plaintiff's response, the Court finds that Plaintiff has failed to meet this requirement. Accordingly, the Court grants the state defendants' motion to dismiss based on qualified immunity.

Defendant Mahoney's Motion to Dismiss

Defendant Mahoney contends Plaintiff's amended complaint must be dismissed as to him because he is not a state actor. Defendant Mahoney is an attorney who represents Somerset Pharmaceuticals, Inc. in on-going civil litigation involving the Plaintiff and Somerset Pharmaceutical. Plaintiff contends that by serving overly broad subpoenas duces tecums in the Somerset case, Defendant Mahoney violated 42 U.S.C. § 1983.

A threshold requirement for any 1983 claim is that the offending party be acting under color of law. 42 U.S.C. § 1983. Even viewing Plaintiff's amended complaint liberally, the complaint fails to allege that Defendant was acting under color of law. See Liam v. Diaz, 9 FLW Fed. D512 (M.D. Fla. Dec. 18, 1995); Tunheim v. Bowman, 366 F. Supp. 1395 (D. Nev. 1973). Accordingly, the Court grants Defendant Mahoney's motion.

Plaintiff's Motion for Leave to Amend and Add Parties

In light of the Court's decision, the Court denies as moot Plaintiff's motion. The Court may entertain a renewed motion which takes into consideration the Court ruling today.

Conclusion

It is **ADJUDGED AND ORDERED** that:

(a) Defendants Daniti, Jones and Orr's Motion to Dismiss (Doc. No. 38, filed November 7, 1995) is **GRANTED**. Plaintiff's amended complaint is **DISMISSED** as to Daniti, Jones and Orr.

(b) Defendant Arthur J. Mahoney's Motion to Dismiss (Doc. No. 42, filed November 13, 1995) is **GRANTED**. Plaintiff's amended complaint is **DISMISSED** as to Defendant Mahoney.

(c) Defendant Arthur J. Mahoney's Motion to Strike (Doc. No. 68, filed March 21, 1996) is **DENIED AS MOOT**.

(d) Plaintiff's Motion for Leave to Amend and

Add Parties (Doc. No. 67, filed March 18, 1996) is **DENIED**.

DONE AND ORDERED at Tampa, Florida, this 22 day of March, 1996.

s/
SUSAN C. BUCKLEW
United States District Judge

Copies to:
All Parties and Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES T. KIMBALL,

Plaintiff,

v.s CaseNo.95-1399-CIV-T-24(E)

ERNIE CLAUSNITZER, et al.,

Defendants.
_____/

ORDER

This Cause is before the Court on the following motions:

(a) Defendants Ernest Clausnitzer, Jose Cordero, Dennis Degan, Philip L.B. Halpern, Steven Perez and Robert Siberski's (collectively the "Federal Defendants") Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim Upon which Relief can be Granted, or in the Alternative, for Summary Judgment (Doc. No. 40, filed November 9, 1995);

(b) Plaintiff's Request for Enlargement of time to Submit a Motion for Reconsideration of the Court's Order Dated March 22, 1996 (Doc. No. 78, filed April 12, 1996); and

(c) Plaintiff's Motion for Leave to Exceed Page Limit (Doc. No. 79, filed April 12, 1996).

After reviewing the Federal Defendants' motion, the pro se Plaintiff's response and First Amended Complaint, the Court set the Federal Defendants' motion for hearing on April 17, 1996. At the hearing, the Court specifically commented on the Plaintiff's pro se status and the applicable standard and repeatedly offered Plaintiff the opportunity to respond to the Federal Defendants' motion.

Accordingly, it is **ADJUDGED AND ORDERED** for the reasons stated at the hearing that the Federal Defendants Motion to dismiss Plaintiff's First Amended Complaint for Failure to State a Claim Upon which Relief can be Granted, or in the Alternative, for Summary Judgment (Doc. No. 40, filed November 9, 1995) is **GRANTED**. **The Court orders Plaintiff to file a motion for leave to file an amended complaint. This motion must be filed within eleven days of today's date and must have attached a copy of the proposed amended complaint. Additionally, the proposed amended complaint is only to apply to the above Federal Defendants and Defendant Lopez and should not name Robert P. Daniti, M. Gregory Jones, or Deborah Orr and/or Arthur J. Mahoney as Defendants.**

IT IS FURTHER **ORDERED AND ADJUDGED** that Plaintiff's Request for Enlargement of Time to Submit a Motion for Reconsideration of the Court's Order Dated March 22, 1996 (Doc. No. 78, filed April 12, 1996) and Plaintiff's Motion for Leave to Exceed Page Limit (Doc. No. 79, filed April 12, 1996) are **GRANTED**. The Clerk is directed to file Plaintiff's Motion for Reconsideration of the

Court's Order Dated March 22, 1996. The Court, however, **DENIES** Plaintiff's Motion for Reconsideration.

DONE AND ORDERED at Tampa, Florida, this 17 day of April, 1996.

s/
SUSAN C. BUCKLEW
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES T. KIMBALL,

Plaintiff,

vs. CaseNo.95-1399-CIV-T-24(E)

ERNIE CLAUSNITZER, et al.,

Defendants.
_____/

ORDER

This Cause is before the Court on Plaintiff's Motion for Leave to Amend Complaint and Parties (Doc. No. 86, filed April 29, 1996) and Defendant Arthur J. Mahoney's Motion for Award of Attorneys' Fees and Costs (Doc. No. 92, filed June 10, 1996). Defendants Ernest Clausnitzer, Jose Cordero, Dennis Degan, Philip Halpern, Steven Perez, Robert Siberski and Martin Katz (collectively the "Federal Defendants") filed a response to Plaintiff's Motion for Leave to Amend Complaint and Parties on May 28, 1996 (Doc. No. 90) and Defendant Ernesto Lopez filed a response on May 30, 1996 (Doc. No. 91). Plaintiff filed a response to Defendant Mahoney's Motion for Attorney's Fees and Cost on June 21, 1996 (Doc. No. 94).

On April 17, 1996 this Court conducted a hearing on

the Federal Defendants' Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim Upon which Relief can be Granted, or in the alternative, for Summary Judgment. At the hearing the Court specifically informed the pro se Plaintiff that this was his opportunity to set forth his claim. See Doc. No. 84, at 2, lines 14-24; at 24, lines 10-14. At the conclusion of the hearing the Court orally granted Federal Defendants Motion to Dismiss. The Court specifically stated that there had been no Fourth Amendment violation. See Id. at 25, lines 20-25. The Court subsequently entered a written Order affirming its decision at the hearing. However, in this Order (Doc. No. 80, filed April 17, 1996), the Court ordered the Plaintiff to file a motion for leave to file an amended complaint. The Order specifically instructed the Plaintiff that the proposed amended complaint "is only to apply to the above Federal Defendants and Defendant Lopez and should not name Robert P. Daniti, M. Gregory Jones, Deborah Orr and/or Arthur J. Mahoney as defendants." See Doc. No. 80 at 2.

Plaintiff filed his motion for leave to file amended complaint and a copy of the amended complaint on April 29, 1996. As the Federal Defendants' response indicates, the granting of Plaintiff's Motion for Leave to Amend would be futile in light of the allegations plead. The Defendants would merely file another motion to dismiss based on the grounds previously recognized by this Court at the April 17, 1996 hearing. Accordingly, the Court denies Plaintiff's Motion for Leave to Amend Complaint and Parties.

Defendant Mahoney seeks attorneys' fees and costs pursuant to 42 U.S.C. § 1988. Section 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections . . . 1983, 1985 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fees as part of the costs.

While attorneys fees' are ordinarily awarded to the prevailing plaintiff, a prevailing defendant will only recover attorneys' fees where the Court finds that the plaintiff's claim was "frivolous, unreasonable, even though not brought in subjective bad faith." Head v. Medford, 62, F.2d 351, 355 (11th Cir. 1995).

Defendant Mahoney is a prevailing party. This Court granted Defendant Mahoney's Motion to Dismiss on March 22, 1996 (Doc. No. 69). The Court found that even viewing Plaintiff's complaint liberally, the complaint failed to allege that the Defendant was acting under the color of law. Moreover, as previously noted, in the April 17, 1996 Order the Court specifically instructed the Plaintiff not to include Defendant Mahoney as a defendant in his amended complaint.

In determining whether Plaintiff's complaint was frivolous, the court considers the following factors:

> (1) Whether or not the plaintiff established a prima facie case;
> (2) Whether or not the defendant offered to settle;
> (3) Whether or not the trial court dismissed the case prior to trial or held a full-blown trial on the merits.

Id. at 356. The Plaintiff failed to establish a prima facie case. As noted above, this Court specifically held that Plaintiff failed to allege that Defendant Mahoney acted under color of law. This is a threshold requirement to any 42 U.S.C. § 1983 claim. Furthermore, Defendant Mahoney asserts that he never offered to settle this matter. Plaintiff's response does not challenge this assertion. Finally, this Court dismissed Plaintiff's claim prior to trial. Accordingly, under the above factors, this Court finds that Plaintiff's case was frivolous and that Defendant Mahoney is entitled to attorneys' fees under 42 U.S.C. § 1988. Defendant Mahoney shall have twenty (20) days from the date of this Order to file the appropriate material in support of his claim for attorneys' fees and costs.

Accordingly, it is **ADJUDGED AND ORDERED** that:

(a) Plaintiff's Motion for Leave to Amend Complaint and Parties (Doc. No. 86, filed April 29, 1996) is **DENIED**.

(b) Defendant Arthur J. Mahoney's Motion for Award of Attorneys' Fees and Costs (Doc. No. 92, filed June 10, 1996) is **GRANTED**. Defendant Mahoney shall have twenty (20) days from the date of this Order to file the appropriate material in support of his claim for attorneys' fees and costs. The Clerk is directed to **CLOSE** this case. The Court, however, retains jurisdiction over any and all motions for attorneys' fees and costs associated with this action.

DONE AND ORDERED in Tampa, Florida, this 7 day of August, 1996.

s/_____
SUSAN C. BUCKLEW
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-3282
Non-Argument Calendar

D. C. Docket No. 95-1399-CIV-T-24E

JAMES T. KIMBALL,

Plaintiff-Appellant,

versus

ERNIE CLAUSNITZER, JOSE CORDERO; DENNIS DEGAN; PHILIP L.B. HALPERN; ERNIE LOPEZ; STEPHEN PEREZ, ROBERT SIBERSKI, ROBERT P. DANITI; M. GREGORY JONES; DEBORAH ORR and ARTHUR J. MAHONEY,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(September 12, 1997)

Before HATCHETT, Chief Judge, EDMONDSON, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

James Kimball appeals the district court's dismissal of his civil complaint. We have reviewed the argument presented on appeal and affirm.

FACTS:

Kimball filed an amended complaint against six federal employees, four state employees, and a private attorney. He sued the federal and state employees only in their individual capacities. The federal employees included three special agents of the U.S. Customs Service (Cordero, Siberski, and Perez), two agents of the Food and Drug Administration (Clausnitzer and Degan), and an Assistant U.S. Attorney for the Southern District of California (Halpern). The state employees included an assistant general counsel for the Florida Department of Health and Rehabilitative Services ("HRS") (Daniti), two HRS drug enforcement agents (Jones and Orr), and an agent of the California Bureau of Narcotics Enforcement (Lopez). Finally, the private attorney (Mahoney) represented Somerset Pharmaceuticals, Inc. ("Somerset") in a civil litigation action filed against Kimball.

Kimball's complaint focused on the execution of federal search warrants on his company, Discovery Experimental and Development, Inc. ("D.E.D.I.") and his home by the federal and state defendants. The federal warrants permitted only the seizure of evidence that tended

to show the smuggling and distribution of the Parkinson's disease drug, Deprenyl. Kimball alleged that before the federal warrants were issued, the federal and state defendants discussed plans to violate the federal warrants. He contended that the state and federal defendants schemed to enter his home and office as federal agents, and then, once inside, began taking -- as state agents -- items that the federal warrants did not cover. To support his allegations, Kimball incorporated several exhibits to his complaint. The exhibits showed, however, that Jones and Orr, the two HRS drug-enforcement agents that accompanied the federal defendants, were there to assist the federal agents in the execution of their search warrants. In addition, they were instructed to act on unrelated state violations if they observed any such violations during the search. Nonetheless, Kimball also asserted that Agent Cordero had executed a search warrant affidavit knowing that the officers who would execute the warrants would exceed the scope of the warrants by conducting an illegal state search and seizure.

Kimball further alleged that Daniti, Halpern, Perez, and Degan had abused or violated Fed.R.Crim.P. 6 by wrongfully using the grand jury process to deny him access to documents that the authorities had seized pursuant to the warrants. He also asserted that Halpern and Daniti had wrongfully disobeyed court orders that had permitted Kimball access to his seized records and assisted Somerset in its civil dispute with Kimball. In addition, he claimed that during the search of D.E.D.I., Orr impermissibly had access to attorney-client documents which concerned an ongoing litigation between Kimball and HRS. Kimball did not specify what documents Orr viewed or how this alleged infraction prejudiced him. Moreover, he claimed that Orr

had conducted an additional warrantless search and seizure when he entered D.E.D.I. after a "small fire" occurred in the facility. Finally, Kimball alleged that all of the federal and state defendants had wrongfully disregarded his permit to possess controlled substances and improperly prosecuted a condemnation action against the seized controlled substances. Kimball sought injunctive and declaratory relief, compensatory and punitive damages, costs, and attorney fees. In addition, he requested that the federal and state defendants return the property that they had seized. He contended that the defendants were liable to him under 42 U.S.C. §§ 1983 and 1985 and the Fourth, Fifth, Ninth, and Fourteenth Amendments.

Daniti, Jones, Orr, and the six federal defendants filed motions to dismiss, or in the alternative, for summary judgment. Mahoney filed a motion to dismiss, while Lopez filed an answer to the amended complaint. Kimball filed a motion for leave to file a second amended complaint.

The court dismissed Kimball's first amended complaint as to Daniti, Jones, Orrs, and Mahoney, reasoning that qualified immunity shielded the first three and that the last was not a state actor. In addition, the court denied Kimball's motion to file a second amended complaint.

The court then conducted a hearing on the federal defendant's motion to dismiss and/or for summary judgment. At the close of the hearing, the court orally granted the federal defendant's motion to dismiss, finding that Kimball had failed to allege that he had suffered an actionable violation of a constitutional right. The court also concluded that no actionable cause was alleged against Lopez and

dismissed the complaint as to him.

In response, Kimball filed a motion for leave to amend the complaint and add parties, and included the amended complaint with the motion. Mahoney filed a motion for attorney's fees. (R4-92). The court denied Kimball's motion to amend his complaint as futile because his proposed amended complaint failed to state a constitutional violation. The court granted Mahoney's motion for attorney's fees.

DISCUSSION:

This Court reviews de novo an order dismissing a complaint under Fed.R.Crim.P. 12(b)(6) for failure to state a claim. Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990). A district court should not grant a Rule 12(b)(6) motion "unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief." Id. In deciding the motion, the court must accept the material allegations of the complaint and its incorporated exhibits as true. Burch v. Apalachee Community Mental Health Services, Inc., 840 F.2d 797, 798 (11th Cir. 1988), affirmed by, 494 U.S. 113 (1990).

Issue 1: Warrantless search and seizure

(a) State defendants

Kimball concedes that the federal agents had a right to ask state officials to assist them in the execution of their federal warrants. He contends, however, that despite any authority that the state actors might have had to be present

during the execution of the warrants, they failed to remain within the parameters of the federal warrant and used the federal defendants' search as a subterfuge for their own unauthorized search.

Defendants Daniti, Jones, and Orr respond that the district court properly found that qualified immunity shielded them from liability. Defendant Lopez, by adopting the federal defendants' brief, argues that the state actors' warrantless search was constitutional under the plain view exception.

To state a § 1983 claim, Kimball must allege that (1) an act or omission deprived him of a right, privilege, or immunity secured by the Constitution or laws of the United States; and (2) the person who committed the act or omission was acting "under the color of state law." Rooney v. Watson, 101 F.3d 1378, 1380 (11th Cir. 1996).

The exhibits that Kimball attached to his complaint belie his contentions. See Burch, 840 F.2d at 798 (in a motion to dismiss, court may look at exhibits incorporated into the complaint). In an excerpt from a deposition purportedly taken from Jones, Jones states that "[i]t was agreed to prior to the execution of the search warrant that were state of Florida violations observed, that Florida would take independent action, independent of the search warrant." Kimball interprets this statement to mean that the state and federal defendants agreed that the state defendants would "piggyback" onto the federal search and conduct their own warrantless investigation. We do not read the statement to say that and conclude that such an interpretation is not a reasonable one. The statement simply shows that the federal

task force made contingency plans in the event they observed additional violations not covered by the federal warrant. Under the plain-view doctrine, a warrantless seizure of evidence is constitutional if the evidence is in plain view and the incriminating nature of the evidence is apparent. Horton v. California, 496 U.S. 128, 129, 110 S.Ct. 2301, 2304, 110 L.Ed.2d 112 (1990).

Kimball does not challenge that the incriminating nature of the evidence seized by the state defendants was apparent. He argues, however, that about three months before the execution of the warrants, agents of the Food and Drug Administration ("FDA") conducted an inspection of D.E.D.I. and that all of the items that the state officials seized during their search and seizure were viewed by the FDA agents and that the federal defendants who executed the warrants knew of the FDA inspection. He thus concludes that the discovery of those items by the state agents during their search was not inadvertent, thus, voiding the plain view exception.

We find Kimball's argument meritless. Assuming that the allegations are true, the exhibits incorporated into Kimball's complaint show that neither the state nor federal defendants had probable cause to believe that additional state narcotics violations would be found at D.E.D.I.'s premises. Although FDA officials inspected D.E.D.I.'s premises several months before the execution of the search warrants, the exhibits do not show that the state officials assisted in the execution of the federal warrants due to their knowledge of the FDA inspection. See In re Southeastern Equipment Co. Search Warrant, 746 F.Supp. At 1580 (Fact that state official "may have had some suspicion as to the presence of the

unrelated information no more lessens the existence of inadvertence than would total surprise."). Accordingly, Kimball's complaint failed to allege that the state defendants violated his constitutional rights during their seizure of chemicals not specified in the federal warrants.

(b) Federal defendants

Kimball argues that the federal defendants are liable to him due to the assistance that these defendants gave to the state actors in conducting their allegedly unconstitutional search and seizure. Because the state actors' search and seizure did not violate Kimball's constitutional rights, any assistance that the federal defendants may have given the state actors also did not violate Kimball's rights.

Issue 2: Denial of access to grand jury materials

Kimball asserts that Halpern and Daniti improperly used the veil of secrecy surrounding a grand-jury proceeding under Fed.R.Crim.P. 6 to deny him access to certain documents and information. The federal defendants respond that Kimball failed to establish a constitutional or statutory right to the materials. Daniti asserts qualified immunity.

In his complaint, Kimball admitted that his business was the subject of a federal grand-jury investigation. Fed.R.Crim.P. 6(e)(2) required the defendants to maintain the secrecy of the grand-jury proceedings. Consequently, it was entirely proper for the defendants to deny Kimball access to the grand-jury materials. More importantly, Kimball did not even allege a constitutional or statutory right to the materials that were before the grand jury. Thus, the defendants' refusal

to disclose information was not actionable.

Issue 3: Conspiracy between state and federal defendants

To establish a claim under § 1985(3), a plaintiff must show "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." See Lucero v. Operation Rescue of Birmingham, 954 F.2d 624, 627 (11th Cir. 1992) (citations omitted). The second element requires "a showing of 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" Id. at 627 (citations omitted). Kimball failed to allege that the defendants had conspired to deprive him of equal protection of the law or that they had any racial or otherwise class-based motive for their actions. Thus, the complaint failed to allege the elements of a § 1985(3) claim.

Issue 4: Allegations against defendant Mahoney

(I) § 1983

Kimball argues that Mahoney, Somerset's attorney, conducted an illegal search and seizure of his documents. He contends that during the course of Somerset's civil dispute with Kimball, Mahoney, armed with an order to compel the production of documents belonging to D.E.D.I., copied not only D.E.D.I.'s documents, but also Kimball's documents and documents belonging to other parties and non-parties to

the Somerset litigation held by the federal defendants. He alleges that three of the federal defendants assisted Mahoney in his unauthorized search and seizure. In addition, he contends that Mahoney supplied these improperly obtained documents to Daniti. Kimball does not argue separately that the district court abused its discretion by granting Mahoney's motion for award of attorney's fees and costs.

Mahoney responds that Kimball failed to state a § 1983 civil-rights action against him because he (Mahoney) was not a state actor and Kimball failed to assert a constitutional violation.

To state a claim under § 1983, a plaintiff must allege that a person acting under color of law committed the conduct complained of. Rooney, 101 F.3d at 1380. Only in rare circumstances can a court view a private party as a state actor for § 1983 purposes. Lowe v. Aldridge, 958 F.2d 1565, 1572 (11th Cir. 1992).

Here, because the facts presented by Kimball, taken as true, do not support any allegation that Mahoney was anything except a private attorney hired by Somerset to pursue a civil cause of action against Kimball, Mahoney was not a state actor for § 1983 purposes. See Lowe, 958 F.2d at 1572 (recognizing three exceptions not applicable to this case). Accordingly, we find no error.

(ii) 1985(3)

Kimball asserts that his complaint established that Mahoney conspired with several of the federal defendants and Daniti to violate his constitutional rights. Mahoney

responds that Kimball's assertions are meritless.

As with the federal and state defendants, Kimball failed to allege that Mahoney and other defendants who had allegedly assisted him in copying unauthorized material conspired to deprive him of equal protection of the law or that they had any racial or otherwise class-based motive for their actions. Thus, the complaint failed to allege the elements of a § 1985(3) claim.

Issue 5: Leave to amend complaint

Kimball asserts that the district court erred in denying him motion to amend his complaint.

This Court reviews the denial of a motion to amend a complaint for abuse of discretion. Hargett v. Valley Federal Sav. Bank, 60 F.3d 754, 760 (11th Cir. 1995). Leave to amend should be freely given absent any apparent reason "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudices to the opposing party by virtue of allowance of the amendment, [amd] futility of amendment[,]" Id. at 761 (citations omitted).

Here, in denying Kimball's motion for leave to file a third amended complaint, the district court found that the granting of that motion would be "futile in light of the allegations plead." The central allegations in Kimball's proposed amendment closely mirrored those in his first amended complaint. We have reviewed these allegations and agree with the district court that any amended complaint was futile.

Issue 6: Right to a trial by jury

Finally, Kimball asserts that the district court improperly denied him a trial by jury.

The Seventh Amendment only requires a court to submit bona fide questions to a jury. See, e.g., Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1077 n.3 (9th Cir. 1986). Because the district court resolved only the legal issue of whether Kimball had stated a claim upon which relief could be granted, the court did not violate Kimball's Seventh Amendment right to a jury.

The judgment of the district court is Affirmed.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

No. 96-3282

JAMES T. KIMBALL,

Plaintiff-Appellant,

versus

ERNIE CLAUSNITZER, JOSE CORDERO; DENNIS DEGAN; PHILIP L.B. HALPERN; ERNIE LOPEZ; STEPHEN PEREZ, ROBERT SIBERSKI, ROBERT P. DANITI; M. GREGORY JONES; DEBORAH ORR and ARTHUR J. MAHONEY,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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Before HATCHETT, Chief Judge, EDMONDSON, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, James T. Kimball, is denied.

ENTERED FOR THE COURT

s/

JOSEPH W. HATCHETT
UNITED STATES CIRCUIT JUDGE

Transcript of Hearing Before Judge Susan C. Bucklew Which resulted in the Order entered on April 17, 1996

JUDGE BUCKLEW:

A motion to dismiss a federal tort claim does present a threshold question of whether plaintiff has alleged that there has been a violation of a constitutional right, and I think that you have not done that as to these defendants in this Complaint, and I am going to grant the motion for a failure to state a claim upon which relief can be granted as to those defendants.

I had thought I might go through each of the issues, but since they really were not argued today in the hearing, I'm probably not going to do that. I would just sort of like to summarize my reasons for ruling as I have.

The first issue in the Complaint, or the issues in the Complaint sort of centered around the searches, the searches, Mr. Kimball, of your residence and of your business. And the business as named being Discovery Experimental & Development, Inc.

And there were a number of issues raised regarding the search, those issues centered around the fact that the -- there was some sort of pretext or sham, and this was really an attempt by HRS to search, this was a search that was, ah -- had HRS representatives or state representatives there, that the presence of those state officers made somehow the search improper. There was an issue regarding the search itself. None of the issues, the fact that if as alleged it was

pretextual, or the fact that there were state agents there, uh, or the fact that there may have been something behind a motivation that was impure by the seeking of the search warrant, is any reason why I should find that -- that this claim states a cause of action.

There's been no Fourth Amendment violation here based on what I have in the Complaint. There was a search warrant from a Magistrate Judge, it -- it was signed by the Magistrate Judge, the search was conducted pursuant to the search warrant, and that's the best reading of the facts as contained in the Complaint.

So, it was nothing alleged about it being arbitrary, so I found nothing surrounding the search warrant to cause any concern and -- the second and third and fourth and fifth, and so on, issues that were raised had to do with issues that really did not allege a constitutional deprivation of any kind.

There were concerns about your being denied access to documents, and that you were wrongfully -- that the Government wrongfully disregarded Rule 6-E, that other people got access to documents that you didn't get access to, that the federal defendants disregarded certain Court orders, I believe, by Judge Kovachevich in the Somerset Pharmaceutical versus Kimball case, the fact that the federal defendants wrongfully disregarded your status as a permittee under chapter 499, the fact that federal defendants wrongfully assisted the plaintiff's adersaries in a civil litigation, the fact that the federal defendants maliciously prosecuted the State condemnation case; none of these allege or rise to the level of a constitutional tort claim. And -- they may be concerns that you might have wanted to raise in the other -- other cases

that you've had, but they're not anything that rise to the level again of a federal constitutional tort claim.

There's also -- there's a request, I believe, for an injunction, and a request for injunctive relief, but I can't also find any basis, no matter how I read the Complaint, for any type of injunctive relief to be granted.

That -- I think if there's any injunctive relief, it would be against these federal defendants in their official capacities, not -- not personally, and so I can't find any reason that that should stand either.

So at any rate, I am going to grant the motion, and I will enter a written order, I will grant the motion for failure to state a claim upon which relief can be granted as to those defendants that I have just outlined.

And, Mr. Kimball, you have 11 days from today's date to file a motion for leave to file an amended complaint. And I will give you the opportunity to file a motion for leave to file an amended complaint, attach your amended complaint to it. But this does not apply to those defendants that I have previously dismissed for qualified immunity.

CONSTITUTIONAL PROVISIONS

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

28 U.S.C. § 1254
Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1331
Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343
Civil rights and elective franchise

(a) the district courts shall have original

jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 2201
Creation of remedy

(a) In a case of actual controversy within its

jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal, Food, Drug, and Cosmetic Act.

28 U.S.C. § 2202
Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 1985
Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges
If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States;

or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, of one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

FLORIDA STATUTES

Florida Statute 499.003(12)
Definitions of terms used in ss. 499.001-499.081

(12) "Establishment" means a place of business at one general physical location.

Florida Statute 499.051
Inspections and investigations

(1) The agents of the Department of Health and Rehabilitative Services and of the Department of Law Enforcement, after they present proper identification, may inspect, monitor, and investigate any establishment permitted pursuant to ss. 499.001-499.081 during business hours for the purpose of enforcing ss. 499.001-499.081, chapters 465, 501, and 893, and the rules of the department that protect the public health, safety, and welfare.

(2) In addition to the authority set forth in subsection (1), the department and any duly designated officer or employee of the department may enter and inspect any other establishment for the purpose of determining compliance with ss. 499.001-499.081 and rules adopted under those sections regarding any drug, device, or cosmetic product. The authority to enter and inspect does not extend to the practice of the profession of pharmacy, as defined in chapter 465 and the rules adopted under that chapter, in a pharmacy permitted under chapter 465. The Department of Professional Regulation shall conduct routine inspections of retail pharmacy wholesalers at the time of the regular pharmacy permit inspection and shall send the inspection report regarding drug wholesale activity to the Department of Health and Rehabilitative Services.

(3) Any application for a permit or product registration or for renewal of such permit or registration made pursuant to ss. 499.001-499.081 and rules adopted under those sections constitutes permission for any entry or inspection of the premises in order to verify compliance with those sections and rules; to discover, investigate, and determine the existence of compliance; or to elicit, receive, respond to, and resolve complaints and violations.

(4) The authority to inspect under this section includes the authority to secure:

(a) Samples or specimens of any drug, device, or cosmetic; or

(b) Such other evidence as is needed for any action to enforce ss. 499.001-499.081 and the rules adopted under those sections.

(5) The complaint and all information obtained pursuant to the investigation by the department are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a). Art.I. of the State Constitution until the investigation and the enforcement action are completed. However, trade secret information contained therein as defined by s. 812.081(1)(c) shall remain confidential and exempt from the provisions of s. 119.07(1) and s. 24(a). Art. I of the State Constitution, as long as the information is retained by the department. This subsection does not prohibit the department from using such information for regulatory or enforcement proceedings under this chapter or from providing such information to any law enforcement agency or any other regulatory agency. However, the receiving agency shall keep such records confidential and exempt as provided in this subsection. In addition, this subsection is not intended to prevent compliance with the provisions of s. 499.0121(6)(d), and the pedigree papers required in that subsection shall not be deemed a trade secret. This exemption is subject to the Open Government Sunset Review Act in accordance with s. 1991.14.

Florida Statute 933.21
Requirements for issuance of inspection warrant

An inspection warrant shall be issued only upon cause, supported by affidavit, particularly describing the place, dwelling, structure, or premises to be inspected and the purpose for which the inspection is to be made. In addition, the affidavit shall contain a statement that consent to inspect has been sought and refused or a statement setting forth facts or circumstances reasonably justifying the failure to seek

such consent. Owner-occupied family residences are exempt from the provisions of this act.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6078-CIV-MARCUS

ARTHRITIS MEDICAL CENTER, INC., et al.,

Plaintiffs,

ORDER OF FINAL SUMMARY JUDGMENT

vs.

STATE OF FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, et al.,

Defendants.

_____/

THIS CAUSE has come before the Court upon the cross motions of Plaintiffs Arthritis Medical Center, Incorporated and Donna Pinorsky Rothblatt and of Defendants Richard Grant, William Page, Gregg Jones, and Robert A. Lourdis for summary judgment. The parties agree that there are no genuine issues of material fact in dispute. For the reasons described below, we grant the Defendants' motion for summary judgment and deny the Plaintiffs' motion for summary judgment.

Plaintiff Arthritis Medical Center, "through and in collaboration with its medical staff, advocates, suggests, encourages and provides treatment for patients with arthritic

symptoms" at its offices in Broward County, Florida. Stipulated Facts at ¶¶ 2 & 9 (filed Oct. 6, 1987). The Arthritis Medical Center treats patients using its "Holistic Balanced Treatment." Plaintiff Donna Pinorsky Rothblatt is an administrator at the Arthritis Medical Center. Id. at ¶ 3.

On or about April 30, 1986, January 12, 1987, January 16, 1987, and March 13, 1987, one or more of the Defendants attempted to enter the Arthritis Medical Center to conduct "a routine inspection." Id. at ¶ 11. Defendant Richard Grant is the administrator of the Pharmacy Program of the Florida Department of Health and Rehabilitative Services. Id. at ¶ 4. Greg Cohler, current Secretary of the Department and successor to Defendant Page, has been substituted for Page and sued in his official capacity in this action. Id. at ¶ 5. Defendants Jones and Lourdis were at all times relevant agents, employees, and servants of the Department. Id. at ¶ 6. All Defendants are sued in their official capacities.[1]

The Florida Drug and Cosmetic Act, Fla.Stat. §§ 499.001-.79, provides among other things, for the licensing and regulation of drug manufactures, drug wholesalers, drug repackagers, and investigational drug programs. See Id. at ¶ 8. The Plaintiffs are not licensed under the Act. Id. at ¶ 14. The Act prohibits "the refusal to permit entry or inspection by the Department of factories, warehouses, or establishments in which drugs, devices, or cosmetics are manufactured, processed, re-packaged, or held . . . . " Fla.Stat. at § 499.005(6); see also Stipulated Facts at ¶ 8. At all time relevant, the Defendants were acting pursuant to the Act and rules promulgated under the Act, and acted under the color of state law within the meaning of 42 U.S.C. section 1983. Id. at ¶¶ 7 & 10.

Each time that any of the Defendants attempted to enter the Arthritis Medical Center, they asserted that the Department had the right to enter and conduct an inspection under the Act. None of the Defendants had obtained a warrant to search the premises. Id. at ¶ 12. On each occasion, Plaintiff Pinorsky Rothblatt refused the Defendants entry and requested that they leave. Id. at ¶ 15. The Plaintiffs refused inspection on each occasion upon the advise of counsel that a lawful warrant must issue before they were required to submit to the inspection. Id. at ¶ 16. The Defendants subsequently imposed fines upon the Plaintiffs for their refusal to permit the inspection.

The Plaintiffs then filed the present action. In their Complaint, the Plaintiffs allege violations of 42 U.S.C. § 1983 and the United States Constitution. Plaintiffs seek a declaration that section 499.051, Fla.Sta., is unconstitutional. They argue that the statute is unconstitutional on its face for lack of sufficient standards to safeguard against unreasonable searches. They also contend that the Act as applied to them was unconstitutional on the grounds that the attempted search was overbroad. Finally, the Plaintiffs seek injunctive relief prohibiting the enforcement of the Florida statutes against them.

I. WARRANTLESS SEARCHES

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

> be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The protections afforded by the Fourth Amendment have been held applicable to action by state law enforcement officers through the due process clause of the Fourteenth Amendment. See Ker v. California, 374 U.S. 23, 30-31 (1963); Ponce v. Craven, 409 F.2d 621, 624 (9th Cir. 1969), cert. denied sub nom., Ponce v. California, 397 U.S. 1012 (1970). Fourth Amendment protection also has been extended to warrantless searches of commercial buildings. Marshall v. Barlow's, Inc., 436 U.S. 307, 317 (1978); See v. City of Seattle, 387 U.S. 541 (1967).

In some instances, however, because of "'special needs' beyond the normal need for law enforcement," the requirement for a warrant and probable cause may be impracticable. Griffin v. Wisconsin, 483 U.S. ---, ---, 107 S.Ct. 3164, 3167 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)); see generally 1 W. Ringel, Searches & Seizures, Arrests and Confessions § 14.3(b)(2) at 14-7 through 14-20.2 (2d ed. 1987). The "special needs" of law enforcement to search without a warrant includes searching of those businesses involved in industries "long subject to close supervision and inspection." Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (retail liquor industry); see also New York v. Burger, 482 U.S. ---, ---, 107 S.Ct. 2636, 2644-45 (1987) (automobile junkyards); Donovan v. Dewey, 452 U.S. 594, 602-03 (1981) (mine health and safety

standards); United States v. Biswell, 406 U.S. 311, 316-17 (1972) (firearm regulations); United States v. Thriftmart, Inc., 429 F.2d 1006, 1008-10 (9th Cir.), cert. denied, 400 U.S. 926 (1970) (federal food standards). The pharmaceutical industry and drug manufacturing industry are such industries with a long history of pervasive supervision and inspection. United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532, 537-38 (8th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Schiffman, 572 F.2d 1137, 1142 (5th Cir. 1978); United States ex rel. Terraciano v. Montanye, 493 F.2d 682, 684-85 (2d Cir.), cert. denied sub nom., Terraciano v. Smith, 419 U.S. 875 (1974); United States v. Montrom, 345 F.Supp. 1337, 1339-40 (E.D.Pa. 1972), aff'd, 480 F.2d 918 (1973); cf. United States v. Roux Laboratories, Inc., 456 F.Supp. 973, 976-77 (M.D. Fla. 1978).

A warrantless search even of a pervasively regulated business is authorized only so long as three criteria are met. First, there must be substantial government interest in regulating the particular industry. New York v. Burger, 107 S.Ct. at 2643-44; Donovan v. Dewey, 452 U.S. at 602. Here, the Plaintiffs admit that "there is 'substantial' government interest in regulating the drug-manufacturing business to protect against impure and mislabeled drugs and in regulating the pharmaceutical industry in general to ensure that drugs are distributed only through 'regular channels.'" Plaintiffs' Motion for Summary Judgment at 8-9. The second criterion for a statute authorizing warrantless inspection is that warrantless inspection must be "necessary to further [the] regulatory scheme." New York v. Burger, 107 S.Ct. at 2644 (quoting Donovan v. Dewey, 452 U.S. at 600). For purposes of the summary judgment motion, the Plaintiffs also have conceded that "a requirement for inspectors to obtain a

warrant before every inspection would hinder, if not defeat, the protection intended by the Florida Drug and Cosmetic Act." Plaintiffs' Motion for Summary Judgment at 9.

Lastly, to pass constitutional muster, a statute authorizing warrantless inspections must safeguard the rights of the business searched. The Supreme Court wrote in New York v. Burger:

> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." Ibid. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. See Marshall v. Barlow's, Inc., 436 U.S., at 323, 98 S.Ct. at 1830; see also id., at 332, 98 S.Ct. 1816 (STEVENS, J., dissenting). To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of the commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Donovan v. Dewey, 452 U.S., at 600, 101 S.Ct. at 2539. In addition, in defining how a statue limits the discretion of the inspectors, we have observed that it must

> be "carefully limited in time, place, and scope." United States v. Biswell, 406 U.S., at 315, 92 S.Ct. at 1596.

107 S.Ct. at 2644. As we understand the Plaintiffs' argument, one of their challenges to the constitutional validity of the Florida statute is that it is not sufficiently comprehensive and defined to put them on notice that they will be subject to periodic inspections for specific purposes. In support of this position, the Plaintiffs have made essentially three arguments.[2] First, the Plaintiffs contend that inasmuch as the Arthritis Medical Center was an unregistered facility, and has not sought or obtained a permit to operate under the Act, the statutory scheme did not provide notice to them of a possible inspection. We do not agree.

The Act sets forth a framework for the regulation of drug manufacturers, wholesalers, and repackagers. It provides:

> No person shall operate as a drug repackager, drug wholesalers, or drug, device, or cosmetic manufacturer in this state unless he has first secured from the department a permit for each drug repackaging, drug wholesaling, or drug, device, or cosmetic manufacturing establishment operated by him. Application for such a permit shall be made on forms to be furnished by the department and shall show the name and address of the establishment for which a permit is sought and the name and address of the owner or owners, partners, and officers.

Fla.Sta. § 499.011(1)(a). A person or entity involved in such a business must register in order to legally market is product:

> Except for those persons exempted from the definitions in s. 499.003(16), (21), or (23), no person shall sell any product which he has failed to register in conformity with this section. Such failure to register shall subject such drug, device, or cosmetic product to seizure and condemnation as provided in ss. 499.062-499.064.

Fla.Stat. § 499.015(3).

> No product under this section which is not included in the annual registration shall be sold until it is registered in compliance with this section. Any product which is considered to be a new drug may not be sold until the new drug application with respect thereto has become effective under s. 505 of the federal act.

Fla.Stat. § 499.015(5). According to the Plaintiff, because they chose not to register their product, they were not subject to the inspection provisions of the Act.

Section 499.051 provides for inspection by the Florida Department of Health and Rehabilitative Services:

> The agents of the department and of the Department of Law Enforcement shall have the authority to inspect, monitor, and

> investigate all drug and cosmetic wholesalers; drug repackagers; investigational drug programs; and drug, device, or cosmetic manufacturers during businesses hours for the purpose of enforcing the provisions of ss. 499.001-499.79, chapters 893 and 465, and the rules of the department which relate to the protection of the health, safety, and welfare of the public.

Fla.Stat. § 499.051. The statute does not limit inspection only to the premises of those drug manufacturers, wholesalers, and repackagers who have complied with the registration provisions of the Act. Rather, section 499.051 authorizes inspection and investigation of "all drug and cosmetic wholesalers; drug repackagers; investigational drug programs; and drug, device, or cosmetic manufacturers . . . ." Id. (emphasis added). Furthermore, the regulations promulgated by the Department pursuant to the Act specifically provide for inspection of unregistered businesses:

> An inspection may also take place in a non-registered facility for determining permitting requirements under Chapter 499, F.S. These inspections shall be considered inspections under the provision of Chapter 499 or any rules promulgated thereunder for the protection of the public health throughout the State.

Fla. Admin. Code Ann. r.10D-45.0545(1) (1986).[3] In view of the statute and regulations promulgated thereunder, a person cannot avoid the inspection provisions of the Act simply by

electing not to comply with the Act's registration requirements.[4]

The Plaintiffs' second argument against the constitutionality of the Act is that it is overbroad. According to the Plaintiffs, because the inspection enforcement provision extends to "factories, warehouses, or establishments in which drugs . . . are . . . held . . .," it is not clear when the inspection provisions apply. The ambiguities the Plaintiffs would have us read into the statute simply are not there. Surely the Act does not extend to a medicine cabinet in a private residence where drugs are "held," and the Department has not attempted to interpret the Act in such a manner. Instead, it is clear that warehouses and other facilities are places where drugs frequently are "held" in large quantities without being manufactured, repackaged, or sold there. The Florida Administrative Code further limits the Act:

> The agents of the Department shall have the authority to inspect, monitor and investigate all drug, device and cosmetic manufacturers, wholesalers, repackagers, distributors, or other facilities where drugs, devices, or cosmetics are made, stored, sold, offered for sale, or kept for sale or use, for the purpose of determining if any of the provisions of Chapter 499, F.S. or any rule promulgated thereunder is being violated and securing such evidence as may be needed.

Fla. Admin. Code Ann. r. 10D-45.0545(2) (1986). Thus, the apparent intent of the Act is not to regulate a small quantity

of drugs "held" by an individual, but to effectuate the Act's purpose by regulating those who deal in more substantial quantities of drugs.[5]

The Plaintiffs lastly contend that the Act is constitutionally invalid because there is a lack of procedural safeguards. Specifically, they aver that Department inspectors have "unbridled discretion" over which unlicensed facilities to inspect and what books and records to inspect. As to determination of which facilities to inspect, the decision is made by the Department, not the individual inspectors.

> Inspectors may be announced or unannounced, at the discretion of the Department. Any owner, officer, or employee of the establishment or business shall make the premises available to the inspecting officer and shall make all records and other information required by Chapter 499, F.S. and the rules promulgated thereunder available to the inspecting officer.

Fla. Admin. Code Ann. r. 10D-45.054(3) (1986). Moreover, these inspections may serve only limited purposes:

> Inspections and investigations are conducted to determine compliance with the provision of Chapter 499, Chapter 893, F.S. and this rule and may include:
>
> (a) Review of all records including receiving documents, shipping documents, purchase orders, purchase

requisitions, invoices, paid receipts, etc., and copying of same;

(b) Surveillance of procedures;

(c) Collection of facts and information;

(d) Questioning of persons who may have information relating to inspection or investigation;

(e) Stop-sale, stop-use, removal, holding, detaining, seizure, or embargo or condemnation of articles, materials, or products;

(f) Photographing of necessary materials, physical plant, articles of products;

(g) Observations and identification of:

1. Drugs, devices or cosmetics consisting wholly or in part of filthy, putrid or decomposed substances;

2. Undesirable conditions or practices bearing on filth, contamination, or decomposition which may result in the drug, device or cosmetic becoming adulterated or misbranded;

3. Unsanitary conditions or practices which may render the drug, device or cosmetic injurious to health;

4. Faulty manufacturing, processing, packaging, or holding of drugs, devices or cosmetics as related to good manufacturing practices including

inadequate or faulty record keeping;

5. Faulty container closures or deviations from recommended processing and temperatures;

6. Indications of non-conformity with Chapter 499, F.S. and this rule;

7. Deviations of label and labeling requirements;

8. Any other matter to determine compliance with Chapter 499, F.S. and this rule.

Fla. Admin. Code Ann. r 10D-45.054(6) (1986).

With regard to the scope of books and records that may be searched, the regulations limit the individual inspector's discretion here too.

(3) For the purpose of enforcing the provisions of Chapter 499, F.S. all manufacturers, repackagers, wholesalers of drugs, and all manufacturers of devices and cosmetics, and all persons engaged in storing, transporting, handling, selling, administering, or in any manner disposing of drugs, devices and cosmetics, shall have records immediately available to the agents of Department and the Florida Department of Law Enforcement of their transactions involving such drugs, devices and cosmetics,

except records of the retail sales transaction to the consume of those products.

(4) Such record shall include records of receipt of raw materials, finished or partly finished products, records of manufacture, wastage, destruction, or sale, or other disposition of such products, as well as records of packaging, repackaging and labeling. These records must provide a complete audit trail from receipt to disposition and shall also include, if applicable, the name and address of consignees of such drugs, devices or cosmetics. Records of receipt must include the name and address of the source of supply, the material or drug, device or cosmetic received, the quantity, the size, if applicable, the date of receipt, and the disposition.

(5) These records shall be maintained and kept at the address of the person or establishment which appears on the appropriate establishment permit application or product registration application submitted by the person to the Department. If no such application exists, such records shall be kept at the place where such drugs, devices and cosmetics are held, sold or disposed of.

(6) These records must be easily retrievable and available to the officer or employee duly designated by the Department

> to have access to them. This officer or duly designated employee shall have the authority to copy or reproduce such records or any information thereon.
>
> (7) All such records must be retained for a period of two years from the date of the transaction, and must be available to the Department for such period.

Fla. Admin. Code Ann. r. 10D-45.053(3)-(7) (1986). As we read the regulation, reasonable limits are placed upon the discretion of Department inspectors.

II. SECTION 499.051 AS APPLIED

According to the Plaintiffs, section 499.051 was applied to them in an overbroad manner. The Department cited the Plaintiffs for:

> Refusing to permit inspection of [the] facility for the purpose of determining compliance with Chapt. 499 F.S. and Chapt. 10D-45 F.A.C., which includes determining drug are not misbranded or adulterated, inspection of labels and labeling, review of all records, including receiving documents, shipping documents, purchase orders, purchase requisitions, invoices and paid receipts.

The Plaintiffs maintain that because they were cited for failing to permit inspection of all their records, that the Act has been applied to them in an overbroad manner. There are

two limitations on such a request that the Plaintiffs have ignored. First, the citation itself limits inspection to those records necessary to determine compliance with the Act. Second, the regulations, as discussed supra, specifically delineate those records that must be maintained and produced for inspection. See Fla. Admin. Code Ann. r. 10D-45.053(3)-(7).[6]

Regulation 10d-053(3)-(7) describes the records that may be examined during an inspection pursuant to the Act. Beyond that, we are aware of no authority for Department inspectors to request to see the records of a drug or pharmaceutical facility. The Administrative Regulations specifically exempt from inspection "records of retail sales transactions to the consumer . . . ." Fla. Admin. Code Ann. r. 10D-45-053(3) (1986). While the citation issued by the Department does contain the language "review of all records," it is limited by the words immediately preceding the phrase and following the phrase. The citation described the records sought as "including receiving documents, shipping documents, purchase orders, purchase requisitions, invoices and paid receipts." The citation also was limited to the scope of a search which could be lawfully conducted under the Act. In other words, the investigation was to determine compliance with the Act and the regulations promulgated thereunder. As such, a search of the Plaintiffs' records only could include

> records of raw materials, finished or partly finished products, records of manufacture, wastage, destruction, or sale, or other disposition of such products, as well as records of packaging, repackaging, and

> labeling. These records must provide a complete audit and shall also include, if applicable, the name and address of consignees of such drugs, devices or cosmetics. Records of receipt must include the name and address of the source of supply, the material or drug, device or cosmetic received, the quantity, the size, if applicable, the date of receipt, and the disposition.

Fla. Admin. Code Ann. r. 10d-45-053(4) (1986). Beyond such records, the Department inspectors have no authority under the Act to conduct a warrantless search of documents, which is sufficient to protect the rights of the party subject to the search. See 3 W. LaFave, Search and Seizure, 660 (2d ed. 1987); see also Bionic Auto Parts & Sales, Inc. v. Fahner, 721 F.2d 1072, 1078 (7th Cir. 1983); State v. Tindell, 399 N.E.2d 746, 748 (Ind. 1980); State v. Norman, 441 N.E.2d 292, 298-99 (Oh.Ct.App. 1981); Kipperman v. State, 626 S.W.2d 507, 511-12 (Tex.Crim.App. 1981); cf. Hosto V. Brickell, 577 S.W.2d 401, 406 (Ark. 1979); Exotic Coins, Inc. v. Beacom, 699 P.2d 930, 942 (Colo.), appeal dismissed, 474 U.S. 892 (1985); State v. Barnett, 389 So.2d 352, 356 (La. 1980); State v. Kirkland, 655 S.W.2d 140, 142 (Tenn. 1983).

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show

> there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

It may be entered only where there is no genuine issue of material fact. Moreover, the moving party has the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

In applying this standard, the Eleventh Circuit explained:

> In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. Adickes, 398 U.S. at 157, 90 S.Ct. at 1608; Marsh, 651 F.2d at 911. All reasonable doubts about the facts should be resolved in favor of the non-movant. Casey Enterprises v. Am. Hardware Mutual Ins. Co., 655 F.2d 598, 602 (5th Cir. 1981). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Marsh, 651 F.2d at 911; Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir. 1969). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. Lighting Fixture & Elect. Supply Co., 420 F.2d at 1213. If reasonable minds might differ on the inferences arising from

undisputed facts, then the court should deny summary judgment. Impossible Electronics, 699 F.2d at 1031; Croley v. Matson Navigation Co., 434 F.2d 73, 75 (5th Cir. 1970).

Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. Adickes v. S.H. Kress & Co., 398 U.S. at 160, 90 S.Ct. at 1609-10; Marsh, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. Brunswick Corp. V. Vineberg, 370 F.2d 605, 611-12 (5th Cir. 1967); See Dalke v. Upjohn Co., 555 F.2d 245, 248-49 (9th Cir. 1977).

Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982); see also Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985), cert. denied, 475 U.S. 1107 (1986).

The United States Supreme Court has recently provided significant additional guidance as to the evidentiary standard which trial courts should apply in ruling on a motion for summary judgment.

> [The summary judgment] standard mirrors the standard for a directed verdict under Federal Rules of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U.S. 476, 479-80 (1943).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Court in Anderson further stated that "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." Id. at 252. In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. Id. at 254. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. Id. at 255.

In another recent case, the Supreme Court has declared that a non-moving party's failure to prove an essential element of a claim renders all factual disputes as to that claim immaterial and requires the granting of summary judgment:

> In our view, the plain language of rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing

> sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no geneuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law"because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) emphasis added).

Given the regulatory scheme promulgated pursuant to the Act, it cannot fairly be said that the inspector's request to examine records was without limitations. The regulatory limitations on the scope of a warrantless inspection may be said to have given the Plaintiff's "adequate notice of 'the purposes of the inspector [and] the limits of his task.'" New York v. Burger, 107 S.Ct. 2636, 2468 n.22 (1987) (quoting United States v. Biswell, 406 U.S. 311, 316 (1972)). Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is GRANTED. It is further

ORDERED and ADJUDGED that Plaintiff's Motion for Summary Judgment is DENIED.

DONE AND ORDERED in Miami, Florida this 22nd day of August, 1988.

s/
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

Footnotes

[1]Defendant Cerita White has not been served and is not a party before this Court. Defendants State of Florida and the Florida Department of Health and Rehabilitative Services have been dismissed. See Plaintiffs' Motion for Summary Judgment at 5 n.5. Additionally, the Plaintiffs have withdrawn their First Amendment claims. Id.

[2]The Plaintiffs have made an additional argument that the Act is overbroad because it regulates not only drugs, but "devices." However, this is a clear misapprehension of the statute as it applies to them, as the Act provides that drug "does not include devices or their components, parts, or accessories." Fla. Stat. § 499.003(8)(d). The definition of "drug" in the Florida Act is identical to the definition of drug in the Federal, Food, Drug, and Cosmetic Act. See 21 U.S.C. § 321(g)(1).

[3]The Plaintiffs conceded that the Arthritis Medical Center had been subject to inspections prior to the attempted inspections giving rise to this lawsuit. Deposition of Donna Pinorsky Rothblatt at 28 (filed Oct. 2, 1987).

[4]We are not bound by the Plaintiff's intent that the Hormone Balance Treatment not be considered a drug within the scope of the Act. National Nutritional Foods Assoc. v. Mathews, 557 F.2d 325, 335 (2d Cir. 1977). Instead, if a substance is "intended to affect the structure or any function of the body of man," it is a drug. United States v. Storage Spaces Designated Nos. "8" and "49" Located at 277 East Douglas, Visalia, Calif., 777 F.2d 1363, 1366 (9th cir. 1985) (quoting 21 U.S.C. § 321(g)(1)(C)), cert. denied sub nom., Nesco v. United States, 107 S.Ct. 1291 (1987). Such an intent may be construed from labeling, promotional, or other relevant material. Id. The Plaintiffs have called the Hormone Balance Treatment a "medication," Exhibit A to Defendants' Request for

Admissions (business card of Plaintiffs) (filed July 22, 1987); Exhibit 3 at 2 to Deposition of Donna Pinorsky Rothblatt (filed October 2, 1987); Exhibit 5 at 11 to Deposition of Donna Pinorsky Rothblatt (book entitled " The Miraculous Holistic Balanced Treatment for Arthritic Diseases"); Deposition of Donna Pinorsky Rothblatt at 13, and intend that the Holistic Balanced Treatment "utilize[] three hormones in combination which seek to balance a chemical imbalance in the human body." Plaintiffs Response to Request for Admissions at ¶ 1 (filed July 22, 1987). The Plaintiffs' product may fairly be said to fall within the statutory definition of "drug" as it is intended to affect the function of the human body.

[5]The purpose of the Act is set forth in section 499.002:

> Sections 499.001-499.79 are intended to:
>
> (1) Safeguard the public health and promote the public welfare by protecting the consuming public from injury by product use, and protecting the purchasing public from injury by merchandising deceit, flowing from intrastate commerce in drugs, devices, and cosmetics.
>
> (2) Provide legislation which shall be uniform as provided in ss. 499.001-499.79 and administered so far as practicable in conformity with the provisions of and regulations issued under the authority of, the Federal Food, Drug, and Cosmetic Act and shall be likewise uniform with the Federal Trade Commission Act to the extent that it expressly prohibits the false advertisement of drugs, devices, and cosmetics.
>
> (3) Promote thereby uniformity of such state and federal laws, and their

administration and enforcement, throughout the United States and in several states.

[6]Not only did the Plaintiffs refuse inspection of all their records, they refused inspection of any of their records.

Office of the Attorney General
State of Florida

AGO 90-28
April 11, 1990

Mr. Gregory L. Coler
Secretary
Department of Health and Rehabilitative Services
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Dear Secretary Coler:

You have asked substantially the following question:

May agents of the Department of Health and Rehabilitative Services conduct warrantless searches pursuant to ss. 499.005, 499.051 and 499.069, F.S.?

In sum:

It has been judicially determined that Department of Health and Rehabilitative Services agents are authorized to conduct warrantless searches pursuant to ss. 499.005, 499.051 and 499.069, F.S., as directed by Rule 10D-45.0545, F.A.C.

Section 499.051, F.S., in pertinent part, provides:

(1) The agents of the department and of the Department of Law Enforcement shall have the authority to inspect, monitor, and investigate all drug and cosmetic wholesalers; drug repackagers; investigational drug programs; and drug, device, or cosmetic manufacturers during business hours for the purpose of enforcing the provisions of ss. 499.011-499.79, chapters 893 and 465, and the rules of the department which relate to the protection of the health, safety, and welfare of the public.

(2) In addition to the authority set forth in subsection (1), the department and any duly designated officer or employee thereof shall have the right to enter upon and

inspect any other facility for the purpose of determining compliance with the provisions of this chapter and rules promulgated thereunder regarding a drug, device, or cosmetic product. The authority to enter and inspect herein contained shall not extend to the practice of the profession of pharmacy, as defined in chapter 465 and the rules promulgated thereunder, in a pharmacy permitted under chapter 465.

Thus, agents of the Department of Health and Rehabilitative Services (department) are statutorily authorized to enter and inspect drug and cosmetic wholesalers, drug repackagers, investigational drug programs, and drug, device or cosmetic manufacturers, as well as other facilities for the purpose of determining compliance with the provisions in Part II, Ch. 499, F.S. Section 499.005, F.S., sets forth those acts which are prohibited under Part II, Ch. 499, F.S., while S. 499.066, F.S., prescribes the penalties and actions which the department may seek against those in violation of the regulatory provisions.

The question has arisen whether agents of the department are allowed to conduct warrantless searches in carrying out their duties under Part II, Ch. 499, F.S.

This issue was addressed in Arthritis Medical Center v. State of Florida Department of Health and Rehabilitative Services. [FN1] The district court in that case examined those situations in which warrantless searches are allowed pursuant to Part II, Ch. 499, F.S. It was found that the entities regulated by Ch. 499, F.S., have a long history of "pervasive supervision and inspection," making them subject to warrantless searches to fulfill the special needs of law enforcement in regulating such entities. [FN2]

The court recognized, however, that warrantless searches of a heavily regulated business must meet three criteria to be valid. First, there must be a substantial government interest in regulating the particular industry. Second, warrantless inspection must be necessary to further the regulatory scheme. Third, the statute authorizing the warrantless inspection must safeguard the rights of the business searched. [FN3]

While all parties in Arthritis Medical Center agreed that the first and second criteria were met, the plaintiff, Arthritis Medical Center, Inc., asserted that Part II, Ch. 499, F.S., did not afford sufficient standards to protect against unreasonable searches. The court pointed to Rule 10D-45.0545, F.A.C., [FN4] which provides guidelines for inspections by agents of the department. Citing that the department makes the decision as to who will be inspected and that the inspections serve limited purposes and are limited in their scope, the court concluded that the regulations in Rule 10D-45.0545, F.A.C., place reasonable limitations on the discretion of department agents. [FN5]

The court concluded that the regulatory scheme promulgated pursuant to Part II, Ch. 499, F.S., limits the scope of a warrantless search and gives those persons or entities searched "adequate notice of 'the purpose of the inspector [and] the limits of his task.'" [FN6]

In light of the judicial decision discussed above, it is my opinion that agents of the department may conduct warrantless searches when carrying out their duties prescribed in Part II, Ch. 499, F.S., and the administrative rules promulgated pursuant thereto.

Sincerely,
Robert A. Butterworth
Attorney General

FN1 Case No. 87-6078-Civ., August 22, 1988 (S.D. Fla., 1988), affirmed, Case No. 88-5984, June 7, 1989 (11 Cir., 1989).

FN2 See, Arthritis Medical Center, supra at p. 5.

FN3 Id. at pp. 5-7. Cf., 21 U.S.C. 880(c), setting forth those instances where an administrative inspection warrant is not required when conducting an inspection of a federally controlled facility: with the consent of the owner, operator, or

agent in charge of the controlled premises; in situations presenting imminent danger to health or safety; in situations involving inspection of conveyances where there is reasonable cause to obtain a warrant; in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or in any other situation where a warrant is not constitutionally required.

FN4 Formerly Rule 10D-45.545, amended November 26, 1986, implementing the statutory authority of Part II, Ch. 499, F.S., to inspect, investigate and monitor persons and entities licensed or permitted under Ch. 499, F.S., and non-registered facilities to determine compliance with Ch. 499, F.S.

FN5 See, Arthritis Medical Center, supra at footnote 1, pp. 10-12.

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